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No. [redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

GEORGE W. CHAPMAN, INC.,

Petitioner

v.

ROBERT E. SHENK,
BANK OF CLARKE COUNTY,

Respondents

In the Matter of George W. Chapman, Inc., debtor

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HARRY MARFUT
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Arlington, Va. 22201
Counsel for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

GEORGE W. CHAPMAN, INC.,

Petitioner

v.

ROBERT E. SHENK,
BANK OF CLARKE COUNTY,

Respondents

In the Matter of George W. Chapman, Inc., debtor

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

George W. Chapman, Inc., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on ~~May~~ JAN 10, 1969.

OPINION BELOW

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit are unreported and are printed in Appendix A hereto, infra, page 11. The Order of the United States District Court for the Western District of Virginia is printed in Appendix A hereto, infra, page 12. The Report of the Referee in Bankruptcy and Special Master is printed in Appendix A hereto, infra, page 13.

JURISIDCTION

The judgment of the United States Court of Appeals was entered on ~~May~~ JAN 10, 1969, infra, Appendix A, page 11. A letter of the Court, dated January 28, 1969, infra, Appendix A, page 16, further advised that no further action is required and that the Order filed January 10, 1969 dismissing the appeal remains in force. A supplemental letter dated January 29, 1969, infra, Appendix A, page 17, alerted petitioner to the Rules of Appellate Procedure governing an application to the Supreme Court of the United States for a writ of certiorari.

The jurisdiction of the Court is invoked under the Bankruptcy Act, § 24(c), Title 11 U.S.C. § 47(c).

Order Staying Mandate issued March 13, 1969, granting a stay pending application of the petitioner to the Supreme Court of the United States for a writ of certiorari within the time permitted by law, infra, Appendix A, page 18.

Order extending time within which to file a petition for a writ of certiorari was signed by the Chief Justice of the United States on April 10, 1969 extending the time to and including June 9, 1969, infra, Appendix A, page 19.

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit erred in dismissing petitioner's appeal, citing Rule 26(b), Federal Rules of Appellate Procedure: "Upon consideration of appellant's [petitioner's] motion for an extension of two weeks to file its Petition for Appeal, and the appellees' [respondents'] motion to dismiss the appeal."

STATUTES INVOLVED

The Bankruptcy Act

§ 24 Sub a, Title 11, U.S.C.A. § 47.

(a) The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

(c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted, July 1, 1898, c. 541 § 24, 30 Stat. 553; May 27, 1926, c. 406 § 9, 44 Stat. 664; June 7, 1934, c. 426, 48 Stat. 926; June 22, 1938, 575 § 1, 52 Stat. 854; June 25, 1948, c. 646 § 39, 62 Stat. 992; July 7, 1952, c. 579 § 9, 66 Stat. 423.

Federal Rules of Appellate Procedure, 28 U.S.C.A., Effective July 1, 1968 (Cited herein as F. R. A. P.)

Rule 3. Appeal as of Right—How Taken.

(a) FILING THE NOTICE OF APPEAL. An appeal permitted by law as of right from a district court shall be taken by

filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeal deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

Rule 6. Appeals by Allowance in Bankruptcy Proceedings.

(a) PETITION FOR ALLOWANCE. Allowance of an appeal under section 24 of the Bankruptcy Act (11 U.S.C. § 47) from orders, decrees, or judgments of a district court involving less than $500, or from an order making or refusing to make allowances of compensation or reimbursement under sections 250 or 498 thereof (11 U.S.C. § 650, § 898) shall be sought by filing a petition for allowance with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed.

Rule 26. Computation and Extension of Time.

(b) ENLARGEMENT OF TIME. The court for good cause shown may upon motion enlarge the time prescribed by these rules by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

Rule 27. Motions.

(a) CONTENT OF MOTIONS: RESPONSE: REPLY. Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order (for which see subdivision (b)) within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice and the court may shorten or extend the time for responding to any motion.

(b) DETERMINATION OF MOTIONS FOR PROCEDURAL ORDERS. Notwithstanding the provision of the preceding paragraph as to motions generally, motions for procedural orders, including any motions under Rule 26(b) may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such motion may request reconsideration, vacation or modification of such action.

STATEMENT OF THE CASE

On August 22, 1968 petitioner (appellant below) filed a timely Notice of Appeal, (R. Vol. I, 46),* as a matter of right, from the Final Order of the United States District Court for the Western District of Virginia, at Harrisonburg, dated July 25, 1968, dismissing petitioner's petition for Reorganization of a Corporation under Chapter X of the Bankruptcy Act, (R. Vol. I, 1).

---

*The Record was prepared in two volumes, a supplement, and a second supplement.

On September 23, 1968, the Honorable Samuel W. Phillips, Clerk of the United States Court of Appeals for the Fourth Circuit, acknowledged by letter to all counsel involved, infra, Appendix B, page 20, that he received the record on appeal from the District Court and that he filed the record and docketed the appeal. He further advised counsel in this letter that the appellant (petitioner here) had until November 4, 1968 to file printed briefs, calling counsel's attention to the Federal Rules of Appellate Procedure, effective July 1, 1968.

On November 1, 1968 petitioner, by counsel, filed a Motion for an extension of two weeks from November 4, 1968 "to file the Petition for Appeal and present the record," which was received by the Court of Appeals on November 4, 1968, but not filed. (Second Supplement to Record) Thereupon, the Clerk of the Court, the Honorable Samuel W. Phillips, in a letter dated November 5, 1968, infra, Appendix B, page 21, advised petitioner's counsel of Rule 6(a), F. R. A. P., pertaining to a petition for an allowance of appeal in bankruptcy proceedings involving less than $500, and he further advised counsel that Rule 26(b), F.R.A.P., prohibits the enlargement of time for filing a petition for allowance of an appeal.

Also on November 5, 1968, respondents (appellees below) filed lengthy motions in response to petitioner's motion of November 1, 1968, each having two captions: one being a motion to deny the extension of time requested by petitioner to file a petition for appeal and to present the record, and the other being a motion to dismiss the appeal (Supplement to record, page 2 and page 11).

On December 10, 1968, the Clerk of the Court, the Honorable Samuel W. Phillips, addressed a letter to petitioner's counsel, infra, Appendix B, page 22, requesting a reply to the question of whether the amount in controversy was less than $500, indicating that there is no appeal as a matter of right in controversies involving less than $500, and further requesting petitioner's counsel to file motions

for leave to file responses to respondents' motions of November 5, 1958 to dismiss the appeal, if so desired.

On December 23, 1968 the Honorable Samuel W. Phillips again wrote to petitioner's counsel, indicating that he received no reply to his letter of December 10, 1968 and that no motion for leave to file responses to respondents' motions of November 5, 1968 were filed. He further informed petitioner's counsel that the motions were being transmitted to a panel in accordance with Local Rule 7, infra, Appendix B, page 24.

On December 26, 1968, by letter to the Honorable Samuel W. Phillips, petitioner asked that his counsel be formally withdrawn from the case, infra, Appendix B, page 25, and on December 30, 1968 it was ordered by the Court that he be allowed to withdraw, infra, Appendix B, page 26.

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered on January 10, 1969, and the appeal was ordered dismissed, infra, Appendix A, page 11.

REASONS FOR GRANTING THIS WRIT

Whether the Circuit Court of Appeals erred in dismissing petitioner's appeal, citing Rule 26(b), F.R.A.P., "Upon consideration of the appellant's [petitioner's] motion for an extension of two weeks to file its petition for appeal, and the appellees' [respondents'] motion to dismiss the appeal":

(1) Petitioner filed a timely Notice of Appeal *as a matter of right* in the District Court pursuant to Section 24 sub (a) of the Bankruptcy Act, 11 U.S.C.A. § 47(a) and Rule 3, F.R.A.P., from the final order of the District Court for the Western District of Virginia dismissing a Petition for the Reorganization of a Corporation under Chapter X of the Bankruptcy Act. No petition for appeal, or Petition for Allowance of Appeal, as described in Rules 6(a) and 26(b), F.R.A.P., was filed or required to be filed in this case, as the amount in controversy was not under $500.

(2) Petitioner's motion of November 1, 1968 for an extension of two weeks to file a Petition for Appeal (appar-

ently an error) should have been filed and acted upon without reference to the amount in controversy, since, on the one hand, if the amount had been under $500, the court was prohibited by Rule 26(b), F.R.A.P., from granting the extension of time asked for in the motion, and, on the other hand, if the amount had been $500 or more, the motion was unnecessary, as the appeal was already taken as a matter of right.

(3) Since this was a motion for a procedural order, the Court ought to have filed it and acted upon it promptly. Under Rule 27(b), F.R.A.P., the Court could have acted upon it even without waiting for a response from the adverse parties. Instead, it was not acted upon until January 10, 1969, over two months later, as a basis for dismissing the appeal.

(4) Having raised the question of the amount in controversy in the case, a jurisdictional question, the Court ought to have decided the question from an examination of the record. In *New York Credit Men's Association v. Brown*, 118 F.2d 6, 7 (1941), a case wherein the bankrupt paid its attorney $600 prior to the filing of the petition, but only $250 of it having been paid in "contemplation of filing the petition," the amount in controversy was reduced to less than $500. Holding that the amount in controversy must be decided by the Court, the Court stated at page 7 that:

> "Our jurisdiction depends upon how much the order of the district court 'involved'; if that was less than $500, it was necessary to obtain leave to appeal under the second proviso of § 24, Sub a, 11 U.S.C.A. § 47 Sub. a, and as no leave was granted we have no jurisdiction, a question we must decide, although the appellee has not raised it. If in the inquiry we are confined to the petition, answer and order of the referee, no leave was necessary; if on the other hand we are free to examine the evidence and the referee's finding, the order of the district court 'involved' less than $500, as has just appeared.

> We have been unable to find any decision upon the question under § 24, Sub. a—or under § 25, Sub. a (3), before 1938—*but during the period when the jurisdiction of the Supreme Court depended upon the amount in dispute it became well settled that the court would look to the record at large.* (Citations omitted.) *We think that the doctrine should be applied to § 24, sub a and that in order to determine our jurisdiction we must examine the whole record.*" (Emphasis supplied.)

(5) It appears, therefore, that since the judgment of the Court of Appeals was upon the consideration of the petitioner's motion, which had not been filed, and the respondents' motions to dismiss the appeal, rather than upon the examination of the whole record, it was error to dismiss the appeal pursuant to Rule 26(b), F.R.A.P.

(6) In accordance with Rule 3, F.R.A.P., the petitioner's inability to perfect its appeal within the time provided after the filing of a Notice of Appeal in the District Court did not affect the validity of the appeal or require the dismissal of the appeal.

(7) According to the decision in *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695, 67 S.Ct. 954, 93 L.Ed. 1184 (1941), the jurisdiction of the Court attached at the time of filing of the Notice of Appeal, and whether a dilatory appellant should be allowed to proceed is within the discretion of the Court. In that case, this Honorable Court affirmed the decision of the Court of Appeals, Second Circuit, allowing the appellant to docket the appeal and file the record on appeal more than 90 days after filing the Notice of Appeal. This decision was followed in *Glenn v. American Surety Co.*, 160 F.2d 977 (1947), wherein the United States entered the case as intervenor. Glenn filed the Notice of Appeal and the United States filed the record on appeal. The Court permitted a correction of the caption of the record and allowed it to be filed as Glenn's record out of time. And in the case of *Annie D. Winters v. Stephen Bradford Crowley, Jr.*, D.C. Cir. Ct. of Appeals,

374 F.2d 317 (1967), a case involving the custody of three children, the Circuit Court of Appeals allowed the filing of briefs more than one year after the Notice of Appeal was filed, reversing the D.C. Court of Appeals on the ground that it was an abuse of discretion not to allow the late filing of briefs in an important case.

(8) It appears, therefore, that since it was within the court's discretion to allow the appellant the additional time needed to perfect its appeal, it was error to dismiss the appeal on the jurisdictional grounds of Rule 26(b). The Court of Appeals had jurisdiction from the time of the filing of the Notice of Appeal.

(9) The motions of the respondents (appellees below) (Supplement to Record, page 2 and page 11), to deny the extension of time sought by petitioner, and to dismiss the appeal, considered by the Court in dismissing the appeal, did not conform to the requirements of Rule 27(a), F.R.A.P., in that they failed to state with particularity the grounds for the order or relief sought. Each motion contained two captions: one caption indicating a motion to deny the extension of time sought by the petitioner, and the other indicating a motion to dismiss the appeal. But the grounds stated were not divided between the motions, and it was virtually impossible to ascertain upon which grounds the one or the other motion was based. It was error, therefore, to dismiss the appeal upon the consideration and granting of such motions.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRY MARFUT
2400 Wilson Boulevard
Suite 300
Arlington, Va. 22201

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12,805

GEORGE W. CHAPMAN, INC.,
Appellant,

versus

ROBERT E. SHENK
BANK OF CLARKE COUNTY,
Appellees.

In the Matter of George W. Chapman, Inc., Debtor.

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg.
Ted Dalton, Chief Judge.

ORDER

[Filed: Jan. 10, 1969
Samuel W. Phillips, Clerk]

Upon consideration of the appellant's motion for an extension of two weeks to file its petition for appeal, and the appellees' motions to dismiss the appeal;

It appearing to the court that the appeal has not been timely perfected, and that an enlargement of time would not be appropriate, Rule 26(b), F.R.A.P.;

It is ADJUDGED and ORDERED that the appellant's motion is denied; the appellees' motions are granted, and this appeal is dismissed.

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

/s/ J. Braxton Craven, Jr.
United States Circuit Judge

/s/ John D. Butzner, Jr.
United States Circuit Judge

A True Copy, Teste:

Samuel W. Phillips, Clerk
By /s/ Jo Ann Kirkpatrick
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

IN THE MATTER OF

George W. Chapman, Inc., Debtor

In Proceedings for Reorganization of a Corporation under Chapter X of the Bankruptcy Act, No. 68-BK-97-H

Upon the report and recommendation of Thomas J. Wilson, Referee in Bankruptcy and Special Master herein, dated the 26th day of June, 1968, it is ORDERED that the petition filed herein by George W. Chapman, Inc., the debtor, be, and the same hereby is, dismissed.

Copies of this order and said report are directed to Ronald L. Walutes, Esq., Gerald E. Williams, Esq., A.

Garland Williams, Esq., Bank of Clarke County, Robert E. Shenk, and George W. Chapman, Inc.

Dated this 25th day of July, 1968.

/s/ Ted Dalton
Chief United States District Judge

SEAL
A TRUE COPY, TESTE:
Leigh B. Hanes, Jr., Clerk
By: /s/ Daisy H. Nalle
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

IN THE MATTER OF

George W. Chapman, Inc., Debtor

In Proceedings for Reorganization of a Corporation under Chapter X of the Bankruptcy Act.
No. 68-BK-97-H

The undersigned, Thomas J. Wilson, Referee in Bankruptcy and Special Master in this proceeding, does hereby respectfully report unto the Court as follows:

The petition of George W. Chapman, Inc., was filed in the Harrisonburg Division of the United States District Court at 3:00 p.m. on April 25, 1968. That petition recited that certain real estate belonging to said corporation had been advertised for sale under a deed of trust foreclosure for Friday, April 26, 1968, at 11:00 a.m., said real estate being a lot with a dwelling house thereon and another tract improved with a service station.

As shown by the pleading filed by A. Garland Williams, Trustee under said deed of trust and attorney for the Bank of Clarke County and one Robert E. Shenk, said real estate was sold on April 26, 1968, to Robert E. Shenk and Bank

of Clarke County, respectively, and deeds to them were executed, delivered and recorded in the Clerk's Office of Clarke County, Virginia, on April 30, 1968.

No application for a stay of the pending foreclosure was made at the time of the filing of the petition or thereafter until May 3, 1968, when the said George W. Chapman, Inc., appeared by Ronald L. Walutes before the undersigned Referee and petitioned for an order requiring A. Garland Williams, Trustee, Bank of Clarke County, and Robert E. Shenk to appear and show cause why the aforesaid sale should not be vacated.

Pursuant to the show cause order entered by the Referee on May 3, 1968, the said A. Garland Williams, Trustee, Bank of Clarke County, and Robert E. Shenk, filed their motions to dismiss the show cause order and appeared in response thereto at Harrisonburg, Virginia, on May 15, 1968, at which time and place George W. Chapman, President of George W. Chapman, Inc., also appeared, evidence was adduced, and the matter was heard by the Referee, who makes the following findings.

At the time of the filing of the petition herein all of the outstanding and issued capital stock for this corporation was owned by George W. Chapman, the president of the corporation. The corporation employs one person, has some $5.00 cash on hand, and can hardly be said to be an operating corporation since its business at the time of the filing consisted of one contract for the installation of a septic system and making repairs to two other septic systems. The income of the business consisted of approximately $300.00 collected from accounts receivable after the filing of the petition and prior to the hearing of May 15, 1968.

The real estate sold under the deed of trust held by the Bank of Clarke County consisted of a dwelling house which was occupied by George W. Chapman, located in Berryville, Virginia, and a service station location which was not operating but used for the storage of certain equipment belonging to the corporation. The corporation also owned another

tract of approximately one and one-half acres with a sizable building on it which, likewise, was available for use for storage and maintenance of equipment.

Mr. George W. Chapman testified that the only creditor he was concerned with and the only one pressing him was the Bank, that being the Bank of Clarke County. He also testified that the only purpose of this proceedings was to avoid the foreclosure proceedings. The two pieces of real estate sold are certainly not indispensable to the operation of the corporation's business. The equity realized upon the foreclosure sale was less than the value placed thereon by the owner, which is not unusual. There has been no showing that the foreclosure sale was not regular in all respects, and the Referee is of the opinion it should not be disturbed.

It appears that this debtor desires a moratorium not a reorganization. On the circumstances in this case, the Referee and Special Master is not satisfied that the petition has been filed in good faith and recommends that the same be dismissed.

Dated this 26th day of June, 1968.

/s/ Thomas J. Wilson
Referee in Bankruptcy
and Special Master

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

January 28, 1969

Mr. George W. Chapman
President
George W. Chapman, Inc.
Berryville, Virginia

No. 12,805, In Re: George W. Chapman, Inc., Appellant. In proceedings for Reorganization of a Corporation under Chapter X of the Bankruptcy Act.

Dear Mr. Chapman:

Your letter addressed to Samuel W. Phillips, Clerk, Fourth Circuit Court, United States Court of Appeals, has been received and placed before the Court.

I have been advised by the Court that no further action is required and that the order filed on January 10, 1969, dismissing this appeal remains in force.

Sincerely yours,

/s/ Samuel W. Phillips,
Clerk

SWP/jak
CERTIFIED MAIL

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

January 29, 1969

Mr. George W. Chapman
President
George W. Chapman, Inc.
Berryville, Virginia

No. 12,805, In Re: George W. Chapman, Inc., Appellant.
In proceedings for Reorganization of a Corporation under Chapter X of the Bankruptcy Act.

Dear Mr. Chapman:

This will supplement my letter of January 28th to you.

Should you desire to appeal the order of this Court, you should be governed by Rule 41(b), Federal Rules of Appellate Procedure, Rule 13 and Rule 21, Rules of the Supreme Court of the United States, and Title 28, § 2101(c), United States Code Annotated. Rule 41 provides that a stay of the judgment of this Court pending application to the Supreme Court may be granted upon motion which must be made within thirty days after the judgment of this Court is filed (order filed on January 10, 1969). Rule 13 applies to the docketing of your case in the Supreme Court and Rule 21 explains how a writ of certiorari to the Supreme Court is sought. Section 2101(c) of Title 28, United States Code, provides that an appeal may be taken from a civil action in this Court to the Supreme Court within ninety days after entry of such judgment.

I suggest that you contact an attorney promptly if you intend to appeal the order of this Court. You should not rely upon the information in this letter to perfect your

appeal, as it is intended only to alert you to the complexity of perfecting an appeal to the Supreme Court.

Sincerely yours,

/s/ Samuel W. Phillips,
Clerk

SWP/jak
CERTIFIED MAIL

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12,805.

In Re:

George W. Chapman, Inc.
Appellant.

In proceedings for Reorganization of a Corporation under Chapter X of the Bankruptcy Act.

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg.

[Filed: March 13, 1969
Samuel W. Phillips, Clerk]

Upon motion of the appellant and for cause shown,

IT IS ORDERED that the order in the above case entered on January 10, 1969 be, and it is hereby, stayed pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided

that the application is filed within the time permitted by law.

/s/ Clement F. Haynsworth, Jr.
Chief Judge

A True Copy, Teste:
Samuel W. Phillips, Clerk
By: /s/ Margaret P. Atkins
Deputy Clerk

Supreme Court of the United States

No. ___, October Term, 1968

GEORGE W. CHAPMAN, INC.,
Petitioner,

v.

ROBERT E. SHENK AND BANK OF CLARKE COUNTY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 9th, 1969.

/s/ Earl Warren
Chief Justice of the United States.

Dated this 10th day of April, 1969.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

September 23, 1968

Ronald L. Walutes, Esquire
Attorney at Law
Post Office Box 156
Alexandria, Virginia

Gerald E. Williams, Esquire
Attorney at Law
1400 North Uhle Street
Arlington, Va., 22201

A. Garland Williams, Esquire
Attorney at Law
Post Office Box 47
Berryville, Va., 22611

No. 12,805, In Re: George W. Chapman, Inc. (Bankruptcy No. 68-BK-97-H)

Gentlemen:

I received from the clerk of the United States District Court at Harrisonburg, Virginia, the record on appeal in the above-entitled case, and I filed the record and docketed the appeal. Enclosed is receipt for the docketing fee.

Also enclosed is order of appearance to be executed on behalf of the appellant and returned forthwith.

It cannot be determined at this time the date of argument. When the calendar is set, counsel will be advised amply in advance.

With respect to the filing and serving of briefs and the appendix, I call your attention to Rules 30 and 31 of the Federal Rules of Appellate procedure effective July 1, 1968.

Twenty-five copies of the appellant's printed brief and ten copies of the appendix should be served and filed in this office on or before November 4, 1968, and twenty-five copies of appellee's brief should be served and filed in this office within thirty days after service of the brief by the appellant.

Sincerely yours,

SAMUEL W. PHILLIPS, Clerk
By: /s/ Carol R. Lemon,
Chief Deputy Clerk

CRL:rwr
Encls.
cc: Thomas J. Wilson, Esq.
Referee in Bankruptcy
Post Office Box 586
Harrisonburg, Virginia 22801

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

November 5, 1968

Gerald E. Williams, Esquire
Court Square West Building
1400 North Uhle Street
Arlington, Virginia 22201

No. 12,805, In Re: George W. Chapman, Inc., Appellant. In proceedings for Reorganization of a Corporation under Chapter X of the Bankruptcy Act.

Dear Mr. Williams:

Thank you for your letter of November 1, 1968, enclosing a motion for an extension of two weeks to file a petition for appeal. The motion has been stamped "received" and has not been filed.

Rule 6(a), Federal Rules of Appellate Procedure, provides that a petition for allowance of an appeal in bankruptcy

proceedings must be filed with the Clerk of the Court of Appeals within thirty days of the date of the entry of the order appealed from with proof of service on all parties to the action in the District Court. A notice of appeal need not be filed. See 11 U.S.C. § 47 and 11 U.S.C. § 650, § 898. Part (b) sets forth the content of the petition and Part (d) governs the filing of a bond for costs if the appeal is allowed.

Rule 26(b), Federal Rules of Appellate Procedure, prohibits the Court from enlarging the time for filing a petition for allowance. Copies of both rules are enclosed for your convenience.

Sincerely yours,

/s/ Samuel W. Phillips,
Clerk

SWP/jak
Enclosures
Copy to: A. Garland Williams, Esquire
16 North Church Street
Berryville, Virginia 22611

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

December 10, 1968

Gerald E. Williams, Esq.
Court Square West Building
1400 North Uhle Street
Arlington, Virginia 22201

No. 12,805, George W. Chapman, Inc., Appellant.
In Proceedings for Reorganization of a Corporation under Chapter X of the Bankruptcy Act.

Dear Mr. Williams:

I have had no reply to my letter of November 5, 1968.

The rules mentioned in that letter may control your appeal.

§ 1291 of Title 28 U.S.C. gives this court jurisdiction of timely appeals from final decisions of the district courts in its circuit. Rule 6, Federal Rules of Appellate Procedure, governs appeals by allowance in bankruptcy proceedings. Where the amount in controversy is $500 or more, there is an appeal as a matter of right. Where the amount in controversy is less than $500 a petition for allowance of the appeal must be filed with the clerk of this court within thirty days of the date of the entry of the order appealed from with proof of service on all parties to the action in the district court. Since a dismissal order is an appealable order, it would appear that the question of "the amount in controversy" must be decided.

I would appreciate a prompt reply to this question with a copy to A. Garland Williams, Esq.

By letter dated November 5, 1968 motions by Robert E. Shenk, appellee, and Bank of Clarke County, appellee, to deny an extension of time to allow appellant to prepare a petition for appeal and to dismiss the appeal were transmitted to this court with copies served upon you by mail. Responses in opposition within seven days after service of these motions should have been filed by you if you felt they were necessary. Rule 27, Federal Rules of Appellate Procedure.

If you desire to file responses in opposition, I suggest that you file a motion for leave to do so within seven (7) days from the date of this letter along with your responses.

If I can be of any help to you or if you have any questions, please let me know.

Sincerely yours,

/s/ Samuel W. Phillips
Clerk

SWP/ipr

cc: Ronald L. Walutes, Esq.
718 Jefferson Street
Alexandria, Virginia 22314

A. Garland Williams, Esq.
16 North Church Street
Berryville, Virginia 22611

Hon. Leigh B. Hanes, Jr.
Clerk
United States District Court
Harrisonburg, Va.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

December 23, 1968

Gerald E. Williams, Esq.
Court Square West Building
1400 North Uhle Street
Arlington, Virginia 22201

No. 12,805, George W. Chapman, Inc., Appellant. In Proceedings for Reorganization of a Corporation under Chapter X of the Bankruptcy Act.

Dear Mr. Williams:

I have had no reply to my letters of November 5, 1968 and December 10, 1968 and assume that you do not desire to file responses in opposition to the motions to dismiss the appeal.

The motions are being transmitted to a panel of this court in conformance with Local Rule 7, supplementing the Federal Rules of Appellate Procedure.

Sincerely yours,

/s/ Samuel W. Phillips
Clerk

SWP/ipr
cc: Ronald L. Walutes, Esq.
718 Jefferson Street
Alexandria, Virginia 22314

A. Garland Williams, Esq.
16 North Church Street
Berryville, Virginia 22611

Hon. Leigh B. Hanes, Jr.
Clerk
United States District Court
Harrisonburg, Va.

George W. Chapman, Inc.
Berryville, Virginia
December 26, 1968

Samuel W. Phillips, Clerk
United States Court of Appeals
Fourth Circuit
Tenth and Main Streets
Richmond, Virginia 23219

Re: George W. Chapman, Inc.
No. 12,805

Dear Mr. Phillips:

Mr. Gerald E. Williams, is General Counsel for George W. Chapman, Inc. He entered his appearance as Counsel in the above matter at my request, even though he was and is not familiar with these type proceedings. Mr. Ronald L. Walutes is primary counsel.

Therefore, I have ask Mr. Williams to withdraw from the above matter and he has prepared an Order to that effect, which I have endorsed and am enclosing. Please send a copy of the Order to Mr. Williams after it has been signed.

Your assistance is appreciated.

Very truly yours,

George W. Chapman, Inc.

/s/ George W. Chapman,
President

Encl.s

UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 12,805.

In Re:
George W. Chapman, Inc.
Appellant.

In proceedings for Reorganization of a Corporation under Chapter X of the Bankruptcy Act.

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg.

[Filed: Dec. 30, 1968
Samuel W. Phillips, Clerk]

Upon motion of George W. Chapman, Inc., appellant, and for cause shown,

IT IS ORDERED that Gerald E. Williams be allowed to withdraw, and he is hereby withdrawn as counsel of record for the appellant, George W. Chapman, Inc., pursuant to Local Rule 5(a).

For the Court—by direction.

/s/ Samuel W. Phillips
Clerk

By: /s/ Carol R. Lemon
Chief Deputy Clerk

A True Copy, Teste:
Samuel W. Phillips, Clerk
By /s/ Margaret P. Atkins
Deputy Clerk

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JUN 10 1969
JOHN F. DAVIS, CLERK

No. 1[redacted]216

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

GEORGE W. CHAPMAN, INC., PETITIONER

v.

ROBERT E. SHENK,
BANK OF CLARKE COUNTY,
RESPONDENTS

In the Matter of George W. Chapman, Inc., debtor

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief for Shenk and Bank of Clarke County in Opposition

A. GARLAND WILLIAMS
16 North Church St.
Berryville, Virginia 22611
Counsel for Respondents

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1502

GEORGE W. CHAPMAN, INC., PETITIONER

v.

ROBERT E. SHENK,
BANK OF CLARKE COUNTY,
RESPONDENTS

In the Matter of George W. Chapman, Inc., debtor

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief for Shenk and Bank of Clarke County in Opposition

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit which dismissed Appellant's (Petitioner's) Appeal from the United States District Court for the Western District of Virginia was entered on January 10, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether the judgment of the United States Court of Appeals for the Fourth Circuit, under the facts and circumstances, was within its discretionary powers by denying Appellant's (Petitioner's) motion to grant it an extension of time to file its petition for an appeal, and granted Appellees' (Respondents') motions to dismiss the appeal.

STATUTES INVOLVED

§ 1291 of Title 28, U.S.C.A., p. 344

FINAL DECISIONS OF DISTRICT COURTS

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Federal Rules of Appellate Procedure 28 U.S.C.A., effective July 1, 1968

(Cited herein as F.R.A.P.)

Rule 2. Suspension of Rules

In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in

Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Rule 3. Appeal as of Right — How Taken

(a) FILING THE NOTICE OF APPEAL. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292 (b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

Rule 26. Computation and Extension of Time

(b) ENLARGEMENT OF TIME. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

Rule 27. Motions

(a) CONTENT OF MOTIONS; RESPONSE; REPLY. Unless another form is elsewhere prescribed by these rules, an applica-

tion for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order (for which see subdivision (b)) within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

(b) DETERMINATION OF MOTIONS FOR PROCEDURAL ORDERS. Notwithstanding the provisions of the preceding paragraph as to motions generally, motions for procedural orders, including any motions under Rule 26(b) may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

Rule 30. Appendix to the Briefs

(a) DUTY OF APPELLANT TO PREPARE AND FILE; CONTENT OF APPENDIX; TIME FOR FILING; NUMBER OF COPIES. The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. The fact that parts of the record are not included in the ap-

pendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix within 40 days of the date on which the record is filed. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

Rule 31. Filing and Service of Briefs

(a) TIME FOR SERVING AND FILING BRIEFS. The appellant shall serve and file his brief within 40 days after the date on which the record is filed. The appellee shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appllee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument.

(c) CONSEQUENCE OF FAILURE TO FILE BRIEFS. If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file his brief, he will not be heard at oral argument except by permission of the court.

Rules of The United States Court of Appeals for the Fourth Circuit Supplementing the Federal Rules of Appellate Procedure (Effective July, 1, 1968) 28 U.S.C.A. Federal Rules of Appellate Procedure, page 333

(Cited herein as Local Rule 7)

ORDER

Pursuant to the authority vested in this court by law and by Rule 47 of the Federal Rules of Appellate Procedure, the following supplemental rules governing the court's practice are adopted, effective July 1, 1968, and shall supersede the court's existing rules, which are hereby rescinded as of said date:

INTRODUCTION

These rules supplement the provisions of law and the rules of the Federal Rules of Appellate Procedure, and exercise the options vested in this court by the latter.

The following table indicates the specific rule of the Federal Rules of Appellate Procedure to which the local rule of this court set opposite supplements:

F.R.A.P. No.	*Local Rule No.*
11	2
27	3
45	4
47	5
46	6
2	7

The attention of the bar is called to the fact that the local rules do not exercise the options contained in Federal Rules of

Appellate Procedure Nos. 11(c), 27(c), 30(a), 30(c), 30(f) and 34(b).

The following table indicates the provisions of the United States Code which the local rule of this court set opposite supplements:

Local Rule No.	*U.S.C.§*
1	Tit. 28, § 48
8	Tit. 18, § 3006A
9	Tit. 28, § 333

7. Pre-argument review; certificates of probable cause; summary dismissal of appeals and denials of certificates of probable cause; notice to appellant or applicant of right to file informal statement and use of same.

(a) In the interest of docket control and to expedite the final disposition of pending cases, the chief judge may, from time to time, designate a panel or panels to review any pending case at any time before argument for assignment or disposition under this rule. The chief judge may also refer to such a panel or panels any application for a certificate of probable cause to appeal a final order in a habeas corpus proceeding where the detention complained of arises out of process by a state court.

(b) If all of the judges of the panel to which a pending appeal has been referred conclude that the appeal is frivolous and entirely without merit, the appeal will be dismissed, or the judgment affirmed. If all the judges of the panel to which a pending appeal has been referred conclude that the judgment below was clearly erroneous, or clearly defective, they may reverse, or vacate the judgment, or grant any other appropriate relief. If all of the judges of the panel to which an application for a certificate of probable cause has been referred conclude that the certificate should not issue, the certificate will be denied; but if any judge of such panel is of the opinion that the issue is debatable, or that full briefing and oral argu-

ment would be enlightening, or otherwise of assistance, the certificate will be issued, and the case set for a regular hearing. A pending appeal may be dismissed, or the judgment appealed from affirmed, reversed, or vacated, or other appropriate relief granted, before the filing of briefs or before oral argument. In the case of an appeal from the denial of a writ of habeas corpus, such summary action may be taken contemporaneously with, or at any time after, action upon the application for a certificate of probable cause.

(c) Omitted — Concerning Certificate of Probable Cause

STATEMENT

On July 25, 1968, the United States District Court for the Western District of Virginia, Harrisonburg, Virginia, entered a Final Order (R. Vol. I, 42)* [Pet. 12] dismissing Petitioner's Petition for Reorganization of a Corporation under Chapter X of the Bankruptcy Act (R. Vol. I, 1-6).

On August 22, 1968, Petitioner filed a Notice of Appeal from the aforesaid Order of July 25, 1968 to the United States Court of Appeals for the Fourth Circuit, (R.Vol. I, 46), [hereinafter referred to as the Court of Appeals].

On September 23, 1968, the Record on appeal in this case was filed and the Appeal docketed by the Honorable Samuel W. Phillips, Clerk of the Court of Appeals, [hereinafter referred to as the Clerk], (R. Vol. II, 1).

On November 4, 1968, a "MOTION" by Petitioner, a part of the Record was marked "Filed Nov. 4, 1968, Samuel W.

*Respondents' statement of the case is restricted to The Record, and not to letters addressed to Petitioner or Petitioner's counsel from the Clerk of the United States Court of Appeals for the Fourth Circuit, or letters from Petitioner or counsel for Petitioner, addressed to the said Clerk.
The Record was prepared in four sections, designated as Vol. I, Vol. II, Supplement to Record, and Second Supplement to Record.

Phillips, Clerk" [Second Supplement to Record]. Said "MOTION" was for an extension of two weeks from November 4, 1968 (the date its printed brief and appendix were due to be served and filed in the Clerk's Office) [Rules 30 and 31 of Federal Rules of Appellate Procedure, effective July 1, 1968], (Infra 4, 5), to allow a newly appointed attorney, who would enter his appearance as special counsel on behalf of Petitioner, and who would "file the Petition of Appeal and present the record to this Honorable Court" (the Court of Appeals). [Second Supplement to Record].

On November 6, 1968, the Clerk of the Court of Appeals received and filed as of the same date motions by counsel for Respondents, in opposition to the aforesaid Motion of Petitioner, with "Bank of Clarke County Exhibits "A", "B", and "C" [Supplement to Record, 7, 8 and 9], accompanied by affidavits [Supplement to Record, 6, 13], with certification that the said motions were mailed to counsel for Petitioner at their respective addresses on the 5th day of November, 1968. [Supplement to Record, 5, 12].

Said respective motions by Respondents: ". . . . and moves this Honorable Court in its discretionary powers to deny an extension of time to allow George W. Chapman, Inc., Appellant's [Petitioner's] new counsel (designated by it as 'special counsel) and who would succeed its present counsel(designated by it as 'special counsel'), namely: Ronald L. Walutes, Esquire, 'to prepare the Petition for Appeal and present the record to perfect said appeal'; and

"To dismiss the Appeal;" [Supplement to Record, 2, 11]. Then followed the reasons for the aforesaid motions [Supplement to Record, 3-5].

The basis for Federal jurisdiction in the Court of first instance was under the Bankruptcy Act, § 24 (c), Title 11 U.S.C. § 47 (c).

ARGUMENT

The Order of the Court of Appeals filed January 10, 1969 (R., Vol. II, 6), [Pet. 11, 12], dismissing Appellant's [now Petitioner's] Appeal is correct, and there is no conflict of decision that calls for further review.

1. This dismissal of Petitioner's Appeal by the Court of Appeals was within its discretionary powers.

The Petitioner on August 22, 1968 filed a timely appeal (R., Vol. I, 46) to the Court of Appeals from the Final Order entered July 25, 1968 by the District Court, which Final Order dismissed Petitioner's Petition for Reorganization of a Corporation under Chapter X of the Bankruptcy Act. (R., Vol. I, 43).

The Record on Appeal was filed and the Appeal was docketed by the Clerk of the Court of Appeals on September 23, 1968 (R., Vol. II, 1).

Two months and some days later, on the date Petitioner's printed brief and apendix were due to be filed in the Clerk's Office, namely, on November 4, 1968, Petitioner's motion was filed (R., Second Supplement to Record) for an extension of two weeks from November 4, 1968 "to prepare the Petition for Appeal and present the record to perfect said appeal" (R., Second Supplement to Record). The aforesaid motion was the only action of prosecution of its appeal (this action requesting a delay) which the Petitioner took from August 22, 1968, the date it filed its Notice of Appeal, to January 10, 1969, when the Court of Appeals dismissed Petitioner's Appeal. (R., Vol. II, 6).

Respondents filed motions on November 6, 1968 to deny any extension of time to Petitioner and for the dismissal of Petitioner's Appeal as is provided by Rule 31. (c) F.R.A.P. (Infra 5).

The Petitioner knew, or should have known, its position

since August 22, 1968, the date its appeal was filed as a matter of right. (R., Vol. I, 46), (Rules 30 (a), 31 (a), (c) F.R.A.P. infra 4, 5).

Weinberger v. Group, Trustee, 399 F. 2d. 34, at 35 (C.A. 1st), [the latter part of second column]:

Two extensions of time for filing the record appendix and brief were granted, the final date of extension being November 24. The Court was in receipt of further motion for extension of time after November 24 had expired. Motion was denied.

PER CURIAM:

> "Appellant knew what his position was since last July. We do not propose, after allowing him the fall to prepare his brief, to give appellees the minimum time, and over the holidays at that.
>
> "An order will be entered denying the motion for further extension of time and dismissing the appeal for want of prosecution."

No excuses were offered by Petitioner in the instant case for the continuous delay in perfecting its appeal; no brief was tendered. One hundred forty-one (141) days (or four months, nineteen days) had elapsed from the date of its Notice of Appeal (August 22, 1968), (R., Vol. I, 46); or, three months, eighteen days from the date the Record was filed and the Appeal docketed in the Court of Appeals (September 23, 1968), (R., Vol. II, 1), until the date the Appeal was dismissed (January 10, 1969), (R., Vol. II, 6).

There was a failure on the part of Petitioner to observe or make any attempt to comply with the Federal Rules of Appellate Procedure. While it is true that its failures may not affect the validity of its appeal, it is grounds for such action as the Court of Appeals might deem appropriate, which may include the dismissal of the appeal, Rule 3. (a) F. R. A. P. (Infra 3).

United States v. Gallagher, 151 F. 2d. 556, at 559 (C.A. 9th).

In this case the appellant had failed to comply with various rules of Federal Rules of Civil Procedure, and no excuse was ever shown.

Clifton Mathews, Circuit Judge, said:—

> "For appellant's failure to comply with Rule 73 (g), 75 (a), and 75 (d) no excuse is shown. The failure does not affect the validity of the appeal, but is ground for such action we deem appropriate. The action we deem appropriate is dismissal of the appeal.
>
> "Motion granted and appeal dismissed."

After the final Order of the Court of Appeals on January 10, 1969, no Petition for Rehearing was filed by Petitioner.

The factual pattern which had developed in the instant case shows that the Court of Appeals acted properly within its discretionary powers. Its judgment of January 10, 1969 would not justify a review of the case.

MacNeil Bros. Company v. Forte, 253 F. 2d. 500, (C.A. 1st); *Larkin v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada*, 338 F. 2d. 335, (C.A. 1st); *Hawke v. McKee*, 391 F. 2d. 262, (C.A. 5th); *Fong v. Glover*, 197 F. 2d. 710, (C.A. 9th); *United Wholesale, Inc. v. Humphrey*, 203 F. 2d. 198, (C.A. 8th).

2. Reply to Petitioner's "Reasons for Granting this Writ".

Paragraph "(1)" states that "no petition for appeal was filed", which is correct; but there was a motion for an extension of time by Petitioner for its new counsel "to prepare the Petition for Appeal and present the record to perfect said appeal." (R., Second Supplement to Record).

As to Paragraph "(2)", there is no place in the Record where the amount in controversy is raised. Petitioner says that the Court of Appeals should have acted upon its motion of November 1, 1968 (filed November 4, 1968), (R., Second Supplement to Record), which it now says is "apparently an error" [Pet. 7, 8], "without reference to the amount in controversy". The Court of Appeals did not have any issue before it about the amount in controversy, so it was not required to act, and did not act upon it, except to look to the Record at large.

In Paragraph "(3)" Petitioner alleges its aforesaid motion was for a procedural order (the one it now says in its Petition was an error); that "the Court could have acted upon it even without waiting for a response from the adverse parties." [Pet. 8]. Rule 27 (b) F.R.A.P. (Infra 4), cited by Petitioner. It says, in part:

> "—motions for procedural orders, including any motions under Rule 26 (b) may be acted upon at any time, without awaiting a response thereto."

But the Court of Appeals did not treat it as a motion for procedural order by its final judgment (R., Vol. II, 6), for if it did, the Court could not have entertained the motions of Respondents opposing the motion of Petitioner, (R., Supplement to Record, 2, 11). Motions for procedural orders, Rule 27. (a) F.R.A.P. (infra 3), says in part:

> "—Any party may file a response in opposition to a motion other than one for a procedural order (for which see subdivision (b)) within 7 days after service of the motion, —"

The Court of Appeals, by its Order of January 10, 1969 (R., Vol. II, 6), did entertain and grant Respondents' motions, which would have been improper if said motions had been motions in opposition to a motion for a procedural order.

Paragraph "(4)": Petitioner states: "Having raised the question of the amount in controversy in the case, a jurisdictional question, the Court ought to have decided the question from an examination of the record." [Pet. 8]. Petitioner does not state who raised the question of the amount in controversy. From the Record, who is to say that the Court did not examine the Record? Respondents submit it did examine the Record. (Local Rule 7, infra 7). There is nothing in the Record about the amount being in controversy, much less as to whom raised it.

Paragraph "(5)": This is not as Petitioner argues — for the Petitioner's motion is marked "Filed, Nov. 4, 1968, Samuel W. Phillips, Clerk." (R., Second Supplement to Record). Rule 26. (b) F.R.A.P. (infra 3) does not state that the Court must —

> "— enlarge the time prescribed by these rules by its order for doing any act, or may permit any act to be done after the expiration of such time —"

Under Rule 31 (c) F.R.A.P. (infra 5):

> "If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for a dismissal of the appeal."

which motion for dismissal Appellees [Respondents] did. (R., Supplement to Record, 2, 11).

Paragraph "(6)": It is agreed that the Notice of Appeal did not affect the validity of the appeal or require the dismissal of the appeal, "but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal." Rule 3, (a) F.R.A.P. (infra 3). The Court of Appeals stated in its Order dismissing the appeal, "that an enlargement of time would not be appropriate, Rule 26 (b) F. R. A. P." [Pet. 11, 12].

Paragraph "(7)": It is within the Court's discretion to allow

a diliatory plea, but the Court of Appeals in the instant case exercised its discretion not to allow an extension of time and to dismiss the appeal; and to enforce the Federal Rules of Appellate Procedure. *In Winters v. Crowley*, 374 F. 2d 317, at 318, (C.A., D.C. 1967), cited by Petitioner [Pet. 10], who states: "– the Circuit Court of Appeals allowed the filing of briefs more than one year after the Notice of Appeal was filed", whereas it was only a matter of days that appellant was late in filing her brief in the District of Columbia Court of Appeals, and then upon disclosure of the circumstances which the United States Court of Appeals, District of Columbia Circuit felt excused her, and remanded to the District of Columbia Court of Appeals for further proceedings.

Paragraph "(8)": Again, it is submitted there is no place in the Record where it shows that the appeal was dismissed on jurisdictional grounds. It had jurisdiction by virtue of § 1291 of Title 28 U.S.C. (Infra 2).

Paragraph "(9)": Respondents submit that their respective motions did comply with the requirements of Rule 27. (a) F.R.A.P. (infra 3); but, if the motions did not, Petitioner never pointed out to the Court of Appeals where Respondents' motions did not comply, and therefore, the inference is that the Court of Appeals must have determined that the motions of Respondents did, or at least did comply sufficiently for it to enter its judgment of January 10, 1969 (R., Vol. II, 6).

3. The Respondents' grounds for their motions in opposition to Petitioner's motion for an extension of time to prepare the Petition for Appeal, were:

Continuing delaying tactics (R., Supplement to Record, 3): Petitioner's motion did not show counsel's inability to affect the timely preparation of the Petition for Appeal and presentation of the record, for there was no disclosure of cause beyond

present counsel's control, or to circumstances which could be deemed excusable neglect to perfect an appeal from the Final Order of the District Court of July 25, 1968 after its Notice of Appeal had been timely filed; and that said motion of Petitioner was not supported by an affidavit, (R., Supplement to Record, 5); and,

The order of relief sought by the Respondents' motions in opposition to the Petitioner's motion was for the appeal to be dismissed.

By the Record in the instant case, there is every indication that the Court of Apeals looked to the Record at large. There was no doubt from the Record it had jurisdiction of the instant case.

It is submitted in the instant case that the Court of Appeals reached its decision on such basis of facts from the Record which would more clearly sustain its judgment for dismissal of Petitioner's Appeal.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

A. GARLAND WILLIAMS,
16 North Church Street
Berryville, Virginia 22611
Counsel for Respondents

JULY, 1969

Office-Supreme Court, U.S.
FILED
JUL 18 1969
JOHN F. DAVIS, CLERK

No. 216

In the Supreme Court of the United States

OCTOBER TERM, 1968

PATRICK G. MARTONE,

Appellant,

v.

CECIL MORGAN, WILLIAM REDMANN, ANDREW P. TUGWELL, J. B. LANCASTER, AND JOHN JULIAN MCKEITHEN,

Appellees.

On Appeal from the Supreme Court of the State of Louisiana

APPELLEES' REPLY TO PETITION FOR REHEARING

ASHTON L. STEWART,
Special Assistant Attorney General of the State of Louisiana,
604 Union Federal Building,
Baton Rouge, Louisiana
70801.

JACK P. F. GREMILLION,
Attorney General of the State of Louisiana,
State Capitol,
Baton Rouge, Louisiana.

Attorneys for Appellees.

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No. 216

In the Supreme Court of the United States

OCTOBER TERM, 1968

PATRICK G. MARTONE,

Appellant,

v.

CECIL MORGAN, WILLIAM REDMANN, ANDREW P. TUGWELL, J. B. LANCASTER, AND JOHN JULIAN MCKEITHEN,

Appellees.

On Appeal from the Supreme Court of the State of Louisiana

APPELLEES' REPLY TO PETITION FOR REHEARING

May it Please the Court:

I.

ONLY ISSUE BEFORE COURT IS CONSTITUTIONALITY VEL NON OF STATUTE

The main thrust of the petition for rehearing is that "events occurring since the inception of this lawsuit in relation to the administration of said state statute give rise to profound questions of constitutional law." None of those events are in the record in this cause. Furthermore, this cause was tried in the Nineteenth Judicial District Court of Louisiana for the Parish of East Baton Rouge solely on the original

petition. The trial was on a rule to show cause why a preliminary injunction should not issue enjoining the Labor-Management Commission of Inquiry, sued as a body politic, from "conducting any investigation or hearing of any type" etc. At the trial of the rule both petitioner and defendants were afforded the opportunity to offer evidence in proof of or in contradiction of the allegations of the petition. (La. Code of Civil Procedure Article 3602). *No evidence was offered by petitioner or defendants on the trial.* An answer to the rule by defendants was not required by Louisiana law, (id., Art. 2593), and none was filed; the cause was put at issue by defendants appearing, and accordingly, all allegations of the petition were considered as denied. Under Louisiana law, as elsewhere, the petitioner was required to prove the allegations of fact in the petition for the rule by evidence as in ordinary cases. (id., Art. 3609). *But, there was no evidence offered by either petitioner or defendants on the trial of the rule.* Additionally, the events alleged in the application for rehearing had not even occurred at the time of the trial below. The only evidence before the court was the statute, as the district court was required by law to take judicial notice of it. (id., 1391) Judgment was rendered on January 5, 1968 by the district court, after trial of the rule, with much argument of counsel, but no evidence, decreeing the statute unconstitutional. This judgment was signed January 9, 1968, and a suspensive appeal therefrom was taken by defendants to the Supreme Court of Louisiana a few minutes later. Later on during the

same day, but after the appeal, the petitioner filed a supplemental petition, the allegations of which were not before the court at the hearing of the rule. The appeal was from the said judgment granting the preliminary injunction.

The allegations in the petition for a rehearing were all matters which occurred after the judgment was rendered by the district court on January 5, 1968 and after an appeal therefrom was perfected to the Supreme Court of Louisiana on January 9, 1969. These allegations are not in the record, and appear in this cause for the first time in this application for a rehearing. The following is a summary of the allegations in the petition for rehearing, all being outside of the record, viz: the allegations of events on January 17, 1968 in Iberville Parish (Petition for Rehearing, page 3); the allegation of the Governor's press conference on January 19, 1968 (id., p. 3); the allegations of criminal charges filed against one Rodney Jenkins on February 15, 1968 (id., p. 4); the allegation concerning one Jerry Sylvester and bail bonds on September 3 and 23, 1968 (id., p. 5); the denial of supervisory writs of Stanley H. Jackson by the Supreme Court of Louisiana (id., p. 6); the change of venue in State v. Jackson on September 30, 1968 (id., p. 7); allegations of events in October, 1968 by Jackson in suit against Gremillion, (id., p. 8); and information filed against one George Wyatt on October 9, 1968 (id., p. 8). None of these allegations are properly before this Court. Hedgeworth v. North Carolina, 334 U.S. 806, 92 L. Ed. 1739, 68 S. Ct. 1185.

Thus, it is clear that the only issue heard and decided by the judgment of the district court was the issue of the constitutionality of the statute on its face. There can be no claim by petitioner that there is any issue now before the Court "in relation to the administration of the statute", as there was no evidence offered in support of any allegations thereof, and the "events occurring since the inception of this lawsuit", all took place after the trial and judgment below, and are not in the record.

On the appeal to the Supreme Court of Louisiana, which was heard on January 18, 1968, the judgment of the district court was reversed, and the statute was ruled constitutional, by opinion handed down on February 19, 1969. Martone v. Morgan, 251 La. 993, 207 So. 2d 770. The present appeal is from that judgment, and only presents the constitutionality vel non of the statute. The Supreme Court of Louisiana only passed on the validity vel non of the statute, as there was no evidence offered on the trial in support of any other claim.

II.

CONSTITUTIONALITY VEL NON OF STATUTE

In approaching the question of the constitutionality of the statute, in the absence of any facts or evidence, there is a presumption that the officials will not misuse the authority vested in them by the statute. We quote from Re Groban, 352 U.S. 330 (334), 1 L. Ed 2d 376 (381), 77 S. Ct. 510, viz:

> "We think, however, that the presumption of fair and orderly conduct by state officials without coercion or distortion exists until challenged by facts to the contrary. Possibility of improper exercise of opportunity to examine is not in our judgment a sound reason to set aside a State's procedure for fire prevention. As in similar situations, abuses may be corrected as they arise, for example, by excluding from subsequent prosecutions evidence improperly obtained."

In order to determine the constitutionality of the statute, under the Fourteenth Amendment's requirement of due process, we must first look to the nature of the investigation proceeding it authorized, and second, determine whether there was a weighty public interest involved in the investigation which was authorized by the statute. Hannah v. Larche, 363 U.S. 420 (442), 4 L. Ed 2d 1307 (1321), 80 S. Ct. 1502. In Hannah, the constitutionality of the procedures in the investigation and report of the Civil Rights Commission was involved. The present statute was modeled after the statute creating the Civil Rights Commission. (42 USCA 1975, etc.) In Hannah, this Court said, viz:

> " 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for

example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The *nature of the alleged right involved*, the *nature of the proceeding*, and the *possible burden on that proceeding*, are all considerations which must be taken into account." (Emphasis supplied)

The Labor-Management Commission was prohibited by the statute from making binding adjudications, and the statute said "it shall be investigatory and fact finding only." This has to do with the nature of the right involved, that is, it could investigate, and could not adjudicate.

It was common knowledge at the time this statute (Act No. 2 of the 1967 Extra Session of the Louisiana Legislature; La. R.S. 23:880.1 through 880.18) was enacted in July, 1967, that the area along the Mississippi River in the vicinity of Baton Rouge was then the fastest growing petro-chemical complex in the United States. This area included the Parishes of East and West Baton Rouge, Ascension, Iberville and St. James. It was also common knowledge that at such time (July, 1967) there were many multi-million dollar petro-chemical plants under construction in that area.

The preamble of the statute commenced with the declaration, viz:

> "Whereas, unprecedented conditions presently exist in the state under which there has been a shut-down of construction work involving industrial development projects giving employment to thousands of persons and vitally affecting the public interest and threatening the orderly conduct of normal labor-management relations;"

Thus, in accordance with this finding by the Legislature, there were incidents damaging to the economy of the State which were taking place. Surely, some governmental action was required in face of such a finding. The Government of Louisiana was required to investigate and find out what these "unprecedented conditions" were, which were so damaging to the economy of the State. Congress enacted the Civil Rights Commission to investigate allegations that certain citizens were being deprived of their vote, which would be a criminal offense. Hannah v. Larche held that statute constitutional. Louisiana was faced with a situation which required investigation not only similar to the investigation by the Civil Rights Commission, but also similar to the investigation of the Fire Marshal of the cause of a fire as was before this Court in Groban. As was stated in the concurring opinion by Mr. Justice Frankfurter, in which Mr. Justice Harlan joined, in Groban,

> "This is not a statute directed to the examination of suspects. It is a statute authorizing inquiry by the chief guardian of a community against the hazards of fire into the causes of fires. To be sure,

> it does not preclude the possibility that a suspect might turn up among those to be questioned by the Fire Marshal. But the aim of the statute is the expeditious and expert ascertainment of the causes of fire."

Thus, there was a high governmental purpose to be served to ascertain the facts in connection with the "unprecedented conditions" which were damaging the economy, in order that some, or all of the branches of government, Executive, Judicial or Legislative, might act to alleviate further damage to the economy of the State. This was the nature of the proceeding, that is, a high public interest was to be served.

The next declaration of the Legislature, as set forth in the preamble of the statute, was, viz:

> "Whereas, in connection with the conditions referred to there have been allegations and accusations of violations of the state and federal criminal laws which should be thoroughly investigated in the public interest;"

A fair inference from this finding of the Legislature is that those charged with the investigation of allegations and accusations of violations of criminal laws were not doing that which it was their duty to do, and that the situation was such that some new investigatory body was needed to get the facts. A reasonable inference from this also is that the Legislature felt that perhaps some of those charged under the then existing law with investigation and prosecution might be involved in the "allegations and accusations of violations" of criminal laws in the labor-management area.

For surely, the Legislature knew that the Sheriff of each parish in Louisiana was charged with the duty to investigate "allegations and accusations of violation" of criminal laws of the State. (La. Code of Criminal Procedure, Art. 131). And surely the Legislature knew that the entire responsibility of every criminal prosecution was on the district attorney in each parish, subject only to an extremely circumscribed right of supervision by the Attorney General of the State (id., Art. 61; Kemp v. Stanley, 204 La. 110, 15 So. 2d 1). And surely the Legislature knew that although a grand jury in Louisiana "may" inquire into offenses (La. Code of Criminal Procedure Art. 437), nevertheless, the district attorney is the legal advisor of the grand jury, and its actions are greatly circumscribed without his leadership. (State v. Platt, 193 La. 928, 192 So. 659). Surely, also, the Legislature knew that the State Police were charged with the duty to detect crime and enforce the criminal laws (La. R.S. 40:1379), subject to certain limitations (id., 40:1386 and 1387).

The findings of the Legislature in the preamble of the statute thus clearly infer that the Legislature was concerned about law enforcement in the area of crime in labor-management relations, and was concerned that perhaps some of those charged with law enforcement were not only not doing that which they were charged under the law to do, but perhaps some of those charged with enforcing the law might be involved in the allegations of violations of criminal law in the labor-management area.

The judgment rendered by the district court was

rendered after a trial where the petitioner was given the opportunity to offer evidence, but did not do so. Therefore, the allegations of the petition are considered as *not proven*, as there was no evidence offered to support them. Thus, the only question before the court on this appeal from that judgment is the constitutionality vel non of the statute.

As was observed in Groban,

> "Prosecution of an individual differs widely from an administrative investigation of incidents damaging to the economy or dangerous to the public."

The investigation in Hannah was held not to be a criminal trial, nor an adjudication of rights by an administrative proceeding, just as the investigation by the fire marshal in Groban was held not to be a criminal trial, nor an administrative proceeding that would in any way adjudicate, but were proceedings solely to elicit facts relating to persons being unlawfully deprived of their right to vote in Hannah, and to the causes and circumstances of the fire, in Groban. That is the situation with reference to the present statute, as it does not adjudicate, but only elicits facts. As was stated in Hannah, viz:

> "xxx when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used."

Though there is no evidence in the record in support thereof, nevertheless, there are inferences that can be made from the finding of fact in the preamble

of the statute, which says that "allegations and accusations of violations" of criminal laws should be investigated. It can be inferred that the Legislature knew that the sheriffs, state police, district attorneys and grand juries were charged with the duty under the law to investigate violations of criminal laws. It can be inferred that the Legislature also knew that there were no indictments by grand juries, or informations filed by district attorneys of such "allegations and accusations" of the violation of criminal laws in this particular labor-management field, despite the existence of "unprecedented conditions" resulting in a shut-down of construction. Thus, there is a clear inference from the preamble that the Legislature believed that there was a weighty public interest in criminal law enforcement in the labor-management field in Louisiana. Some inference that could be indulged in as to the "allegations and accusations of violations" of criminal laws, which would be reasons for the failure of some of the public officials charged with enforcing the law to perform their duty and thus to make necessary an investigative agency over and above the Sheriffs and State Police, might be, viz:

(a) That a sheriff, claiming to act as the business agent for a labor union, used his position as sheriff to intimidate persons connected with construction projects in his parish; and that such sheriff knew, consented to, and participated in, subjecting individuals connected with construction work in his parish to a system of intimidation, harrassment, favoritism and corruption.

(b) That there were state police in high ranks engaged in shakedowns and public bribery in connection with construction work in the State.

(c) That there were a business agent of a labor union and a head of a material supply concern, who conspired, and through extortion, induced by the wrongful use of fear, through threatened strikes and work stoppages by members of the labor union of the agent, required those building the petro-chemical plants to purchase materials from such material supply concern, in such construction work at prices higher than prices therefor otherwise obtainable in the market.

The statute also specifically set forth another reason for its need, that is, that the district attorneys, grand juries and other law enforcement agencies were limited in their jurisdiction to parish lines, and that additional investigative facilities were needed on a statewide basis, viz:

> "xxx in order to supplement and assist the efforts and activities of the several district attorneys, grand juries and other law enforcement officials and agencies of the State of Louisiana and of the U.S., it is imperative that additional investigative facilities on a state-wide basis be made available;"

The membership of the Labor-Management Commission of Inquiry consisted of three representatives of labor, three representatives of management and three representatives of the public. The labor members,

at the time the petition was filed, as well as at present, consist of the State Vice-President of the AFL-CIO, the State Secretary-Treasurer of the AFL-CIO, and a Jesuit Priest who was a member of the faculty of Loyola University of New Orleans. The management members then and now consist of the manager of one of the world's largest oil refineries; the head of a large construction company, and the head of another large business. The public members, at the time the petition was filed, consisted of the Dean of the Law School of Tulane University, who was Chairman, the Dean of the Law School at Louisiana State University, as Vice-Chairman, and the President of a large bank in Southwest Louisiana. The Dean of the Tulane Law School has now been replaced by the President of Louisiana Polytech College. The Dean of L.S.U. has resigned.

There could hardly be a problem confronting a community with more of a "weighty public interest" than the problem facing Louisiana at the time this Statute was enacted to investigate the problem.

As was stated in Hannah, the rules of procedure for the type of proceeding which adjudicates, if made mandatory for an investigation proceeding, would

> "xxx make a shambles of the investigation and stifle the agency in its gathering of facts."

The recognized rights of witnesses in an investigation proceeding, which did not adjudicate, were fully granted: The statute provided for representation by counsel for a witness; and full protection of a witness from self-incrimination. Though the statute did deny

the right of a witness to cross-examine other witnesses, nevertheless such witness could submit questions which the Commission would ask if it deemed them appropriate to its inquiry. The statute limited the right of any person claiming to be defamed to present witnesses, by requiring him to submit a list of witnesses he may wish to have subpoenaed, with the issuance of subpoenaes for such witnesses to be in the discretion of the commission. There were other controls to protect a person from being defamed. The rights of a person subpoenaed were protected up to the point where such person would not be permitted to make a shambles of the investigation. The Commission could not adjudicate, and its findings were to be a report, such as made by any other purely investigative body.

The fact that there would be collateral consequences from the Commission making investigations and reports would not affect the legitimacy of the Commission's investigative function. We quote from Hannah, viz:

> "xxx the respondents contend, and the court below implied, that such procedures are required since the Commission's proceedings might irreparably harm those being investigated by subjecting them to public opprobrium and scorn, the distinct likelihood of losing their jobs, and the possibility of criminal prosecutions. That any of these consequences will result is purely conjectural. There is nothing in the record to indicate that such will be the case or that past Commission hearings have had any harmful effects upon witnesses appearing before the Commission. However, even if

such collateral consequences were to flow from the Commission's investigations, they would not be the result of any affirmative determinations made by the Commission, and they would not affect the legitimacy of the Commission's investigative function."

xxx

"Cf Sinclair v. United States, 279 US 263, 295, 73 L ed 692, 698, 49 S. Ct. 268, holding that Congress' legitimate right to investigate is not affected by the fact that information disclosed at the investigation may also be used in a subsequent criminal prosecution. Cf. also McGrain v. Daugherty, 273 US 135, 179, 180, 71 L ed 580, 595, 47 S. Ct 319, 50 ALR 1, holding that a regular congressional investigation is not rendered invalid merely because 'it might possibly disclose crime or wrongdoing' on the part of witnesses summoned to appear at the investigation. Id 273 US at 180."

But, the petitioner claims that the Commission is "nothing but a trial agency." And the heavy argument of petitioner is that a report of the Commission might conclude that there was "probable cause to believe" that a named person had violated a criminal law. We quote the provision requiring a report, viz:

"the Commission shall make and publicize its findings with respect to the question whether or not there is probable cause to believe that there are or have been violations of any criminal law xxx. The Commission shall have no authority to and it shall make no binding adjudication with respect to such violation or violations; however, it may, in its discretion, include in its findings the

conclusions of the commission as to specific individuals or as to the general situation, or as to both, xxx."

There is no substantial difference between the report required of this Commission from the report made by any other investigating body, where the report of its findings do not adjudicate and are made public. The report of this Commission, as required by the above quoted portion of the statute, in substance is no more than the report required in the Civil Rights Commission statute (42 USCA 1975c), the constitutionality of which was sustained in Hannah, viz:

(Civil Rights)
"The Commission shall submit interim reports to the President and to the Congress xxx."

The Civil Rights Commission, amongst other duties, was directed to

"(5) investigate allegations, xxx, that citizens of the United States are unlawfully being accorded or denied the right to vote xxx, as a result of any patterns or practice of fraud or discrimination in the conduct of such election;"
(42 USCA 1975c(5)).

To "unlawfully" accord or deny a citizen the right to vote is a crime, and the Civil Rights Commission was to investigate relative to according or denying a citizen the right to vote, which, of course, was to investigate crimes. Here, the Labor-Management Commission was authorized to investigate to see if there were any vio-

lations of criminal statutes relative to labor-management relations.

The Civil Rights Commission under the broad requirement of the statute to submit a report, was just as authorized as the Labor-Management Commission to include in its report "findings with respect to the question whether or not there is probable cause to believe that there are or have been violations of any criminal law" in the area of voting as the Labor-Management Commission was in the area of labor-management. The Civil Rights Commission could not make a binding adjudication, and neither can the Labor-Management Commission. The Civil Rights Commission, under the statute creating it, had just as much right as the Labor-Management Commission had to include in its findings "the conclusions of the commission as to specific individuals or as to the general situation, or as to both, xxx", for the Civil Rights Commission was also authorized to make "findings", (42 USCA 1975c (b)).

To "publicize" the report as required by this statute is in substance no more than the requirement in the Civil Rights Commission statute that such Commission "submit interim reports". To publicize a report is to make it *openly*, as distinguished from confidential. There is nothing in the Civil Rights Commission Statute which provides that its reports shall be confidential. The filing of such reports with the President and Congress would certainly publicize such reports.

The statute creating the Civil Rights Commission

contemplated that its hearings were to be public (42 USCA 1975a (e) and (g)) just as the Labor-Management Commission statute. These public hearings are in respect of "this nations historic distrust of secret proceedings." Re Oliver, 333 U.S. 257 (273), 92 L. Ed. 682 (694), 68 S. Ct. 499.

There can be no complaint as to secrecy of the proceedings or as to right of counsel, as both are commanded here, and the dissent in Re Groban, would not apply to this statute.

For the foregoing reasons, it is respectfully submitted that the petition for rehearing should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Ashton L. Stewart, Special Assistant Attorney General of the State of Louisiana, attorney for appellees herein and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of July, 1969, I served a copy of the foregoing Reply to Petition for Rehearing on the appellant herein by mailing said copy in a duly addressed envelope with first class postage prepaid to his attorney of record, J. Minos Simon, Esquire, 1408 Pinhook Road, P. O. Box 52116, OCS, Lafayette, Louisiana 70501.

Baton Rouge, Louisiana, this ..... day of July, 1969.

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